IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

CRP.No. 589 of 2006()

AGAINST THE ORDER DATED 25/07/2006 IN INEA 117/04,EP 61/03 IN OS.432/2004 of MUNSIFF COURT,ATTINGAL

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REVN. PETITIONER: PETITIONERS

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1. KANIYAPURAM ASAN MARAKKAR APPACHA
   THEKKATHU JANAKEEYA COMMITTEE PRESIDENT,
   REPRESENTED BY KASIM KUNJU, S/O.YOOSUF KUNJU,
   MANAKKATTUVILAKOM VEEDU, THEKKEVILA MURI,
   PALLIPPURAM VILLAGE.

2. KANIYAPURAM ASAN MARAKKAR APPACHA
   THEKKATHU JANAKEEYA COMMITTEE SECRETARY,
   THAHA, S/O.MEERANKUTTI, MOOPANVILAKATHU VEEDU,
   KADINAMKULAM MURI, KADINAMKULAM VILLAGE.

3. KANIYAPURAM ASAN MARAKKAR APPACHA
   THEKKATHU JANAKEEYA COMMITTEE TREASURER,
   SHAHUL HAMEED, S/O.IBRAHIM KUNJU,
   MANAKKATTUVILAKATHU VEEDU, KADINAMKULAM VILLAGE.

BY ADV. SRI.SIBY MATHEW
SRI.A.A.MOHAMMED NAZIR

RESPONDENTS: COUNTER PETITIONERS

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1. ABDUL KHADER ASAN AHAMMEDU KUNJU,
   THEKKATHIL VEEDU, KADINAMKULAM DESOM,
   KADINAMKULAM VILLAGE.

2. KASIM PILLAI RASHEED, -DO- -DO -

3. MOHAMMED SALI ABDUL HAKKIM,
   -DO - -DO-

4. AYISHA BEEVI HOUWA UMMAL,
   -DO- -DO-

5. AYISHA BEEVI NABEESA BEEVI,
-DO- -DO-

6. MOHAMMED KUNJU NAZEER,
-DO- -DO-

7. PATHUMMA BEEVI LYLA, -DO- -DO-

8. ABDUL RASHEED NIZAR, -DO- -DO-

9. AHAMMED KUNJU SUBAIRKUNJU,
PATHUKANNI VEEDU, THEKKEVILA MURI,
PALLIPPURAM PAKUTHI.

10. AASHYA UMMAL AYSHA BEEVI,
THEKKATHIL VEEDU, KADINAMKULAM MURI,
KADINAMKULAM PAKUTHI.

11. KANIYAPURAM MUSLIM JAMA-ATH,
REPRESENTED BY ITS PRESIDENT,
KANIYAPURAM MUSLIM JAMA ATH, KANIYAPURAM.

12. KANIYAPURAM MUSLIM JAMA-ATH SECRETARY,
KANIYAPURAM, CHANNANKARA P.O.

13. SULTHAN PILLAI S.S. SHA,
SULTHAN MANZILIL, CHITTATTUMUKKU DESOM,
MENAMKULAM MURI, MENAMKULAM VILLAGE.

14. KHALIDU ABDUL MAJEEDU,
MALAMELPARAMBU, KADINAMKULAM MURI,
KADINAMKULAM VILLAGE.

15. KATHIRUPILLAI ABDUL SALAM,
KANJIRAM MOOTTU VEEDU, MENAMKULAM MURI,
MENAMKULAM VILLAGE.

16. MOHAMMED KANNU POOKUNJU CALLED
M.P.KUNJU, NAVAS MANZILIL,
KADINAMKULAM MURI, KADINAMKULAM VILLAGE.

17. ISMAYIL PILLAI SAIFUDEEN,
VALIYAKADA BUNGLOW, KANIYAPURAM DESOM,
VALIYAVEETTUMURI, PALLIPPURAM VILLAGE.

18. KALANTHARKUNJU BASHEER,
BUSHRA MANZILIL, KADINAMKULAM MURI,
KADINAMKULAM VILLAGE.

BY ADV. SRI.THOMAS M.JACOB FOR R1,R3,R4,R5,R6,R7,R8, R9, R10
SRI.G.RAJAGOPAL
SRI.A.SAMEER

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

1. Order dated 25-7-2006 in E.A.No.117/2004 in E.P.No.61/2003 in O.S.No.432/1990 passed by the Munsiff's Court, Attingal.

Respondents Exhibits:-

1. Exhibit R3(a):- True copy of the decree dated 15-03-1994 in OS 432/90 in the files of Munsiff's Court, Attingal.

2. Exhibit R3(b):- True copy of document No.150/1995 dated 11-09-1995.

3. Exhibit R3(c):- True copy of document No.120/1997 dated 19-09-1997.

4. Exhibit R3(d):- True copy of judgment dated 31-05-2005 in OS 247/1996 and OS No.263/1996 in the files of Munsiff's Court, Attingal.

/true copy/

P.S. To Judge

M.Sasidharan Nambiar,J.

C.R.P.No.589 of 2006

Dated this the 14th day of December,2006

O.R.D.E.R

Petitioners are the petitioners in E.A.No.117/04 in E.P.61/03 on the file of Munsiff Court, Attingal. The decree was passed in O.S.432/90 in favour of fourteen plaintiffs and defendants 1 and 2. As per the decree,it was declared that legal representatives of Sheik Nainar Kochu Marakkar and Meeravu Kunjali are plaintiffs and defendants 1 and 2 and they are entitled to possess the plaint A schedule property and reconstruct thekkathu or elankam in the plaint A schedule property and administer the place of worship in the name of Asan Marakkar thekkathu and elankam and for recovery of possession of plaint B and C schedule properties from defendants in their capacity as legal heirs of Kochu Marakkar and Kunjali. Defendants 3 to 12 were also restrained by a permanent prohibitory injunction from starting

any place of worship in the name of Assan Marakkar Appacha Thekkathu and from interfering with the rights of plaintiffs to administer and possess A, B and C schedule properties. Though the decree and judgment were challenged, the appeal was dismissed and admittedly the decree became final. E.P. 61/03 was filed by plaintiffs 1,3,and 6 to 12, 14 who are respondents 1 to 10 herein. In the execution petition E.A.117/04 was filed by the petitioners to get themselves impleaded as assignee decree holders under Ext.A1 agreement. They also sought permission to execute the decree as provided under Order XXI Rule 16 of Code of Civil Procedure contending that the entire rights of the decree holder were assigned in their favour and they are therefore entitled to execute the decree and so the petitioners in the execution petition are not entitled to execute the decree. Petitioners in the execution petition objected to the claim contending that they have no right to get themselves impleaded or execute the decree.

Executing Court as per order dated 23.11.05 dismissed the application. Petitioners challenged that order before this court in C.R.P.1150/05. As per order dated 24.2.06 this court set aside the said order and E.A.117/04 was remitted back to the executing court to pass fresh order considering the objections raised by the respondents and the claim made by the petitioners. Thereafter Pws 1 to 3 were examined and Exts.A1 to A3 were marked on the side of the petitioners and DW1 was examined on the side of the respondents and Exts.B1 to B8 were marked. Learned Munsiff as per order dated 25.7.06 dismissed the application once again finding that Ext.A1 agreement is void in view of Order XXIII Rule 3B and there is no evidence to prove that Ext.A1 was acted upon and petitioners were administering the affairs of Thekkathu under Ext.A1 and therefore they are not entitled to get themselves impleaded as assignee decree holders or seek execution of the decree. This revision petition is filed challenging that order.

2.Learned counsel appearing for the petitioners and respondents were heard.

3. Learned counsel appearing for petitioners argued that learned Munsiff has not considered the question properly and under Ext.A1 the entire rights of the decree holder were assigned in favour of Janakeeya Committee represented by the petitioners and respondents,and though respondents filed a suit contending that Ext.A1 was subsequently cancelled that suit was dismissed as not pressed under Ext.A3 and therefore they are not entitled to challenge the validity of Ext.A1 agreement and under section 146 of the Code of Civil Procedure, petitioners are entitled to come up on record and as assignees of the decree holders they are entitled to come up on record and the impugned order is to be set aside. It was also argued that Order XXIII Rule 3B does not apply to the facts of the case and evidence establish that under Ext.A1 agreement the thekkathu and the properties are being managed by petitioner and

therefore the order is to be set aside and petitioners are to be permitted to continue the execution proceedings as assignee decree holders.

4. Learned counsel appearing for respondents argued that Ext.A1 agreement was not executed by all the decree holders and the decree provides for religious performance and religious office which cannot be transferred by an assignment and Ext.A1 is void on that sole ground and therefore petitioners are not entitled to come up on record under the agreement. The learned counsel also argued that under Ext.A1 executants transferred their right as members of the Charitable Society alone and not the right obtained under the decree and therefore in any event under Ext.A1 petitioners are not entitled to come up on record as assignee decree holders. Reliance was placed on the following decisions in **Sarkum Abu Torab Abdul Waheb v. Rahaman Buksh (ILR Calcutta 83), in Shahed Baksh vGolam Nabi Khondokar (A.I.R.1919 Calcutta 1064),**

M.M.Hussain Faroki v. S.Abdul Huq (A.I.R. (29) 1942 Madras 485), in Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty (I.L.R. Madras 235), in R.Venkatesa Archagar v. E.Ekambara Archagar (ILR 1966(1) Madras 374 and in Radha Nath Das. v. Produmna Kumar Sarkar (ILR (1939) 2 Calcutta 325, in Hemachand Kishorilal v. Tekchand Kalloolal (AIR 1959 M.P. 403), in Jugalkishore v. Raw Cotton (AIR 1955 SC SC 376).

5. In the impugned order, the learned Munsiff held that Ext.A1 agreement is barred by the provisions of Order XXIII Rule 3B and therefore petitioners are not entitled to seek any relief thereunder. The other grounds stated is that there is no evidence to prove that Ext.A1 agreement has taken effect and they are in management of the properties as claimed. Learned Munsiff also found that petitioners cannot stand in the shoes of the decree holders under the agreement and therefore the petition was dismissed.

6. It is admitted fact that the suit was

instituted in the representative capacity and a publication as provided under Order 1 Rule 8 was effected and the decree granted is in a representative suit, Order XXIII Rule 3B provides that no agreement or compromise be entered in a representative suit, without leave of the court. Under sub rule (1) no agreement or compromise in a representative suit shall be entered into without the leave of the court expressly recorded in the proceedings and any such agreement or compromise entered into without the leave of the court so recorded shall be void. Under sub rule (2), before granting such leave, court shall give notice to such persons as it may appear it to be interested in the suit. The Explanation provided therein makes it clear that representative suit provided in the rule includes a suit instituted under Order 1 Rule 8 of Code of Civil Procedure. The argument of learned counsel appearing for respondents is that by virtue of clause (d) of Explanation, any other suit in which the decree passed may, by virtue of

the provisions of the Code or of any other law for the time being in force, bind any person who is not named as party to the suit and therefore rule 3B applies to a stage subsequent to the passing of the decree also.

7. The question is whether the bar provided under section 3B applies to an agreement entered into by the parties after the decree was passed. A reading of sub rule (1) makes it clear that what is contemplated under sub rule (1) is an agreement or compromise entered into in a representative suit during the pendency of the suit. It cannot have any application when such agreement was entered into subsequent to the passing of the decree. When an agreement is entered into after the date of the decree Section 3B does not contemplate a leave either to be sought from the court or granted by the court. The question of seeking leave or granting leave would arise when the proceeding is pending before the court. Once the decree is passed, the proceedings will end and therefore the

bar provided under section 3B will not be applicable to an assignment of the decree entered into by the parties subsequent to the passing of the decree. As to the compromise or adjustment in execution, rule 2 of Order XXI and Section 47 of the Code provide for a procedure. Rule 4 of Order XXIII specifically provides that nothing in Order XXIII shall apply to any proceedings in execution of the decree. Therefore Rule 3B of Order XXIII will not make Ext.A1 void as found by the executing court. But that does not mean that the right of the decree holder to assign the decree or the right of the assignee decree holder cannot be considered by the executing court. But that question has nothing to do with the leave provided under section 3B. It could only be on the validity of the assignment or the right of the decree holder to assign the decree. Therefore the finding of the learned Munsiff that Ext.A1 is void because of the non-seeking of leave or non-granting of a leave as provided under Rule 3B of Order XXIII of the Code

is not correct.

8. Learned counsel appearing for petitioners then argued that at the time when the agreement was executed, the decree was challenged before the Appellate Court and the appeal was pending and therefore without leave the agreement could not have been entered into. That question would arise only in a case where that agreement is made use of in the pending appeal as an appeal is a continuation of the suit. On that ground also the right under Ext.A1 cannot be negatived.

9. The crucial question is whether Ext.A1 agreement is invalid as contended by the learned counsel appearing for respondents, on the ground that by the said transfer the religious right to perform the offerings could be assigned. Learned counsel appearing for the respondents relying on various authoritative pronouncements of various courts vehemently argued that courts have consistently taken the view that an office attached essentially to the conduct of religious worship and

performance of religious duties is not legally saleable and the decree granted in favour of the decree holders is essentially the right to conduct religious worship and performance of religious duties and it is not a legally saleable subject and therefore for that sole reason it is to be found that petitioners did not derive any right under Ext.A1. It was also argued that as seen from Ext.A1, the executants assigned their right in their capacity as members of the Charitable Society and not the right obtained under the decree. These aspects were not considered by the learned Munsiff. These are relevant aspects which are to be considered while considering the right of petitioners claimed in the case. Learned counsel appearing for the petitioners argued that this case was never set up by the respondents before executing court and was argued for the first time in this revision petition and even when the order of the executing court was challenged in the earlier revision petition, respondents had not

raised such a contention and therefore petitioners could not adduce evidence to meet the said contention and therefore if those contentions are to be advanced, petitioners have to be granted opportunity to let in necessary evidence for meeting the contention and therefore the case has to be sent back to the executing court. Learned counsel appearing for the petitioners then argued that the decree was passed more than 12 years back and it was once remanded and in such circumstance further remand may be avoided and this court may decide the question.

10. As pointed out by the learned counsel appearing for the respondents, even in the earlier civil revision petition respondents did not challenge the right of the petitioners claimed under Ext.A1 agreement on the basis that the right assigned is not a legally saleable right. Therefore petitioners did not get an effective opportunity to meet the contention raised by the respondents. In such circumstances, it is only in

the interest of justice to afford them opportunity to meet the contentions. As these aspects were not considered by the learned Munsiff and it is found that it is necessary to afford an opportunity to the petitioners to let in further evidence on this aspect, the impugned order passed by the executing court is set aside. E.A.117/04 is remitted back to the executing court for fresh disposal in accordance with law. The learned Munsiff to dispose the application and the E.P as expeditiously as possible and in any event within four months from the date of receipt of the records. Respondents are also permitted to file additional objection raising these contentions before the executing court.

Civil Revision Petition is disposed as above.

M.Sasidharan Nambiar
Judge

tpl/-

M.SASIDHARAN NAMBIAR, J.

CRL.R.P.NO. /97

ORDER

MARCH,2006